No. 20667

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESS H. NICHOLAS, JR.,	)
	)
Appellant	)
	)
vs	)
	)
SECRETARY OF THE DEPARTMENT OF INTERIOR, AND THE UNITED STATES OF AMERICA,	)
	)
Appellee.	)

REPLY BRIEF OF APPELLANT

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C. The court erred in failing to find the Secretary of the Department of the Interior abused his discretion when he did not find that cultivation had been accomplished by the Appellant.

Appellant respectfully refers the Court to the SUMMARY OF ARGUMENT found on pages 10 - 11 of Brief of Appellant previously submitted.

1. Scope of judicial review of decisions of the Secretary of the Interior. Recent cases have invalidated the position of the Appellee on this point. Decisions of the Secretary of the Interior are not given special treatment under the Administrative Procedure Act.

2. Effect of decisions of the Secretary of the Interior. Recent cases have invalidated the position of the Appellees on this point.

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that a homesteader is entitled to a liberal interpretation of the homestead requirements. Most of the citations to which Appellee is objecting were requirements set out by the Department of the Interior or were statements made in front of the Solicitor of the Department of the Interior.

4. Estoppel of the Department of the Interior. The actions of the Department, taken in conjunction with the general rule that a homesteader is entitled to favored treatment, clearly establish an estoppel situation.

5. Cultivation Determination. Recent cases indicate that, in contrast to the position of the Appellee, the determination of Secretary as to adequate cultivation is not final.

D. The Court erred by not granting Appellant's prayer for equitable relief. Appellee has apparently waived objections to this contention. Appellant respectfully refers the Court to the Summary of this topic found on pages 11 - 12 of Brief of Appellant previously filed.

III. ARGUMENT

A. The Court erred in relying on the administrative decision as having a rational basis.

Appellee has made no effort to defend the "rational ba test" utilized by the trial court, nor has Appellee attempted to defend the decision of the Secretary as being rational. Accordingly, Appellant respectfully refers the Court to Pages 13 - 16 of Brief of Appellant for a comprehensive treatment of this topic.

B. The trial court erred in not permitting the administrative record to be amplified.

Homesteaders are entitled to a liberal interpretation. See citations throughout Brief of Appellant. Therefore, it is the position of the Appellant that the court erred by not permitting Appellant and others to give testimony.

C. The Court erred in failing to find the Secretary of the Department of the Interior abused his discretion when he did not find that cultivation had been accomplished by the Appellant.

1. Scope of judicial review of decisions of the Secretary of the Interior.

The argument of the Appellee on this point is merely legalistic and in complete disregard of the favored

treatment to which a homesteader is entitled. As is further discussed in 2. and 5. below, the courts are now protecting homesteaders from inequitable treatment by the Department of the Interior.

In essence, Appellee is arguing that decisions of the Secretary of the Interior are entitled to special treatment when brought before a court for judicial review. The same argument was made by the Department and rejected in Coleman v. United States, 363 F.2d 190 (9th Cir. 1966). This very court replied:

> At the outset, we are faced with contentions by the Government seeking to limit the scope of judicial review of decisions in the Department of the Interior. This campaign commenced some years back when first it was broadly contended that the Administrative Procedure Act does not apply to Decisions of the Secretary of the Interior. This Court had no difficulty in rejecting this contention. . . . . Next, as in this case the Secretary has argued that the determination of a question of fact by the Secretary of Interior, or his authorized representative, is conclusive in the absence of fraud or imposition" and that "decisions of the Secretary of Interior with respect to public lands have historically been accorded a conclusiveness beyond that of typical regulatory agencies." These are not the standards for review provided in the Administrative Procedure Act. . . . . Page 194
>
> Our study of . . .decisions and others has not persuaded us that Congress intended decisions of the Department of the Interior which reject application for patent to enjoy a more favored

position than those of other executive agencies under the Administrative Procedure Act. Page 195. (Emphasis supplied)

The issues, then, which faced the District Court are those provided in the Administrative Procedure Act. Were the "agency action, findings, and conclusions * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence? 5. U.S.C. §1009(e)(B)(1)(5). Page 196. See also Stewart v. Penny, 238 F. Supp. 821, 827 (D. Nevada 1965)

2. Effect of decisions of the Secretary of the Interio

Appellee contends that decisions of the Secretary of the Interior are binding upon a reviewing court in the absence of a showing that the Secretary's decision is Clearly erroneous. The Brief of Appellant satisfactorily establishes that the decision of the Secretary was "clearly erroneous."

Eventhough Appellant has shown that the decisions of the Secretary was "clearly erroneous", it should be pointed out that Appellee is applying an incorrect standard. Decisions of the Secretary of the Interior are not entitled to special consideration under the Administrative Procedure Act. As set forth by this court, a decision of the Secretary will be overturned where it is arbitrary, capricious, and abuse of discretion, not in accordance with law or unsupported by substantial evidence. United States v. Coleman, supra. Under any of these tests, the decisions of the Secretary cannot

stand as is explained in the Brief of Appellant.

3. The Record

Appelle has objected to the consideration by the Court of certain authorities cited by Appellant. The inclusion of this argument in Appellee's Brief is an indication of the weakness of the over-all position of the Appellee. Homesteaders are favored in the law. See citations throughout Brief of Appellant. However, for some reason, Appellee refuses to accept the mandate of the United States Supreme Court on this question. This Court has considered the type of evidence to which Appellee objects. Coleman v. United States, supra, at page 197.

The affidavits were made by a homesteader with first hand knowledge of the facts therein. The Department of the Interior changed positions on the Appellant. Brief of Appellant, Page 15. The requirements of the Department are "fantistically complex." Brief of Appellant, page 34. This Court is aware of the bewildering aspects of these requirements and has protected a claimant from unfair treatment by the Department. United States v. Coleman, supra, at Page 203. Moreover, these affidavits were apparently admitted before the District Court, or at least there was no ruling, to the knowledge of the undersigned, which kept the affidavits out of the

record. Therefore, if Appellee opposed the consideration of the affidavits by this Court, Appellee should have filed a Notice of Appeal.

Appellee has objected to citations from Senate Committee Hearings. The hearings concerned legislation which Senator Ernest Gruening of Alaska introduced in the Senate. The statements were made in front of Mr. Frank J. Barry, Solicitor for the Department of the Interior. Therefore, the agency was aware of the statements. Mr. Barry is the superior of the gentleman who wrote the Secretary's Decision which is at issue.

The objection by Appellee to consideration of the publications set forth in the Record at pages 58-77 is incredible. It is beyond the pale of imagination how an agency could argue it was not aware of the very requirements set forth by that agency. These publications are distributed to the general public and are titled:

> Department of the Interior
> Bureau of Land Management
> HOMESTEADING IN ALASKA

The newspaper article concerned hearings before the Public Land Review Commission established by the 88th Congress. This Commission was set up to review the administration of public land laws and recommend improvements to Congress. The

statements cited were made by Howard Pollack, now Congressman Howard Pollack.

Accordingly, all of the citations should be considered by the Court. Each citation indicates that the argument of the Appellee is without foundation.

4. Estoppel of the Department of the Interior.

The Department is applying stricter requirements to Appellant than have been applied to other homestead applicants. Further, the Department changed positions. The Secretary concedes that there is no fixed standard of cultivation. (R-6) At the time Appellant was proving up, the Department publications did not emphasize the methods of cultivation. R-62). However, subsequent publications set out cultivation requirements in more detail. These subsequent publications should not be controlling as they were not in effect at the time of proving up. Brief of Appellant, pages 14-6 and 20-22.

Appellant explained that Department employees informed him that clearing alone was sufficient and further that he travelled to the Anchorage office when he was unable to rent a tractor. Due to the fault of the Department, the office was understaffed. After waiting for a considerable length of time in a room crowded with oil speculators, Appellant was informed by a Department employee that an exception on cultivation could

be granted at the time of final proof. This is in accord even with the retroactive and inappropriate requirements Appellee is attempting to apply. (R-72)

Appellee's statement that Appellant is a District Court Judge is incorrect. Appellant is a Deputy Magistrate (title has recently been changed to Magistrate). The jurisdiction of a magistrate is limited to cases $500.00 and below and to misdemeanors. AS 22.15.120, as amended. Appellant's jurisdiction is similar to a Justice of the Peace outside. Moreover, Appellant was not serving in this capacity while he was proving up.

Appellee relies heavily on Great Northern Railway Co. v Reed, 270 U.S. 539. However, it is clear that Reed only requires substantial compliance which Appellant has satisfied. Brief for Appellee, Page 18. See also citations to the effect that a good faith effort is satisfactory on pages 21-24 and 36 of Brief of Appellant. Citations set forth in the Brief of the Appellant also establish that there is flexibility in interpreting homestead requirements.

Appellee is attempting to enforce a high standard of cultivation when it is admitted there is no such standard. This approach removes Appellee from any assistance of Robertson v Udall, page 20, Brief for Appellee, as that case requires a

decision of the Secretary to be within the bounds of reason.

5. Cultivation determination.

Appellee continues to argue that decisions of the Secretary are entitled to special consideration. This approach was rejected by this Court in Coleman v. United States, supra. Likewise, in Coleman a determination of the word valuable was overturned. This argument was rejected in Stewart v. Penny, 238 F. Supp. 821 (D. Nev. 1965). This case is set forth at length on pages 18-19 and 26-30 of Brief of Appellant.

Appellee sets out a definition of cultivation on page 24 of Brief for Appellee. It must be pointed out that the Secretary has held that clearing one-half acre of land qualifies under basically the same definition relied upon by the Appellee. John E. Tyrl, 3 L.D. 49 (1884). See Brief of Appellant, pages 22-3.

Margaret L. Gilbert v. Bob H. Oliphant, 70 I.D. 128 (1963) is not applicable to this proceeding because it was not in effect at the time Appellant was proving up. Further, Oliphant is distinguishable in that there was no attempt to explain his failure to comply. In the instant situation, Appellant has explained over and over again that he could not obtain a tractor. Further, he was informed by the Department that clearing alone was sufficient and that he could make an

application for relief at the time of final proof. (R-23-4)

Appellee contends that the non-standard of cultivation which it is attempting to enforce has been in effect for forty years and that the Department has never varied therefrom because no discretion is permitted. This is hardly the case. In two decisions dealing with Alaska, the Secretary has indicated that estoppel may be permissible against the Department and that there is discretion as to cultivation. See John Robert Claus, Richard H. Yoder, 60 I.D. 457 (1951) and Walter H. Bullwinkle, Joseph E. Vogler, 63 I.D. 179 (1956). See citations set forth throughout Brief of Appellant to the effect that discretion is permitted as to cultivation.

It is the position of the Appellant that he has satisfied the cultivation requirements. Taking into consideration the obstacles of nature and environment with which Appellant had to contend, the planting of rye was sufficient and Appellant's efforts at cultivation qualify as a process of cultivation. Stewart v. Penny, page 29, Brief of Appellant.

D. The Court erred by not granting Appellant's Prayer for equitable relief.

In addition to the coverage of this point found at pages 33-37 of Brief of Appellant, Appellant respectfully presents a quotation from this Court.

It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as against third persons . . .It is such a legal right which Appellant here seeks to assert and its not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject "in the absence of fraud or imposition." This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious and illegal deprivation by action of executive and administrative agencies. Coleman v United States, 363 F. 2d 190, 196 (9th Cir. 1966). (Emphasis supplied)

IV. Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FISHER & HORNADAY

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